2014 IL App (4th) 130819

NO. 4-13-0819

FILED
September 15, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

PRAIRIE STATE BANK & TRUST, an Illinois Banking Corporation, Plaintiff-Appellant and Cross-Appellee, v. DEERE PARK ASSOCIATES, INC., an Illinois Corporation, Defendant-Appellee and Cross-Appellant.	)	Appeal from Circuit Court of Macon County No. 10L143 Honorable Scott B. Diamond, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Plaintiff waived its interest in its security agreement with Just Sofas and Mattresses, LLC, due to its inaction and failure to monitor Just Sofas.

(2) The trial court's denial of defendant's motion for sanctions based on its contentions plaintiff's conversion complaint was based on misrepresentations of fact and a claim not based in existing case law was not an abuse of discretion.

¶ 2 Plaintiff, Prairie State Bank & Trust, an Illinois banking corporation, appeals from the trial court's decision for defendant, Deere Park Associates, Inc., an Illinois corporation, in plaintiff's complaint for conversion brought against defendant based on plaintiff's status as the first secured creditor of Just Sofas and Mattresses, LLC (Just Sofas), and defendant's status as a purchase-money secured-interest holder and consultant to Just Sofas, who handled the going-out-

of-business sale and liquidation of merchandise sale for Just Sofas' two furniture stores. Defendant handled the proceeds of the two sales and paid other creditors and itself before paying anything to plaintiff, the priority creditor.

¶ 3 Plaintiff filed this action against defendant, claiming defendant converted its collateral inventory and proceeds which secured loans it made to a bankrupt merchant, Just Sofas. After a bench trial, the trial court found all disputed questions of fact were decided in favor of defendant, plaintiff failed to prove damages, and plaintiff waived its security interest by its manner of handling its loans to Just Sofas and failure to enforce its secured rights.

¶ 4 Plaintiff filed a notice of appeal, after which defendant filed a motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013). The trial court denied the motion for sanctions but amended its judgment to award costs of $115 to defendant. Plaintiff filed an amended notice of appeal to include its appeal of the court's making an award of costs to defendant but not an appeal of the amount of costs assessed.

¶ 5 Plaintiff argues (1) it is entitled to judgment against defendant for conversion; (2) the trial court erred in applying a contributory negligence standard to find plaintiff waived its security interest in the inventory and proceeds at issue; (3) the court erred in finding defendant's control and distribution of the inventory proceeds was not wrongful as to plaintiff; (4) the court erred in finding Just Sofas was not in default on its loans and plaintiff was not entitled to possession of the proceeds at issue; and (5) the court applied the wrong measure of damages and erred in finding plaintiff failed to prove its damages by a preponderance of the evidence. We affirm.

¶ 6 I. BACKGROUND

¶ 7 On or about June 22, 2007, plaintiff made a loan to Just Sofas guaranteed by the Small Business Administration (SBA) in the principal amount of $200,000. The term of the loan was 5 1/2 years, payable in monthly installments of $3,804. The SBA guaranteed 75% of the loan. At the same time, plaintiff made a working-capital loan to Just Sofas in the principal amount of $100,000. This was a single-pay note having a maturity date of June 25, 2008. This note contained a security agreement intended to secure all loans to Just Sofas, including the SBA loan. The inventory of Just Sofas and the proceeds from its sale were the collateral for the loans. On July 13, 2007, plaintiff filed a Uniform Commercial Code (UCC) Financing Statement with the Illinois Secretary of State listing as collateral all the inventory of Just Sofas "wherever the property is or will be located, and all proceeds and products of the property."

¶ 8 On June 27, 2008, plaintiff executed a renewal of the $100,000 loan as a line of credit. At the time, Just Sofas had been paying its loan installments in a satisfactory manner to plaintiff. In July 2008, Just Sofas requested an additional loan of $75,000 from plaintiff to expand its operations. Up until that time, Just Sofas had only one store, in Decatur, Illinois. It wanted to expand and open a store in Bloomington, Illinois, and Danville, Illinois. Plaintiff denied the loan request because it believed Just Sofas' owner did not have enough experience and it was not in Just Sofas' best interest to have multiple stores. Despite the loan denial, Just Sofas opened a store in Bloomington.

¶ 9 On March 4, 2009, Just Sofas borrowed an additional $25,000 from plaintiff, evidenced by a note in that amount payable on April 5, 2009. This loan was also secured by inventory and proceeds. At the time plaintiff made this loan, Just Sofas was paying its loan obligations in a manner satisfactory to plaintiff.

¶ 10 On April 6, 2009, Just Sofas entered into a consulting agreement with defendant. Under the terms of the agreement, defendant would provide specified services for sales, to be conducted at the Just Sofas stores in Bloomington and Decatur. The theme of the Bloomington sale was to be "store closing" and "going out of business," and the theme of the Decatur store was to be "wall to wall liquidation to re-merchandise the store to serve you better." Under the terms of the agreement, defendant selected a "store manager" and an "accounting manager" for each store location, with the "store manager" for Bloomington to act as "sale manager" for both stores. Defendant was to "supervise the advertising campaigns, themes, and costs." The agreement required the sale would utilize Focus Media Group, LLC, for which defendant's president is listed as the sole managing member.

¶ 11 Under the terms of the agreement, the sales included Just Sofas' existing inventory and "additional inventory," which defendant agreed to obtain on its own credit. Just Sofas authorized defendant to "file and establish a prime first UCC-1 security lien in the Additional Inventory and proceeds thereof." The agreement also required all of the sale proceeds, including those arising from the existing inventory, to be deposited into a single "Sale Account" administered by defendant.

¶ 12 Under the terms of the consulting agreement, defendant was entitled to a commission of 8% paid on the full price of all merchandise sold at the Bloomington store and 5% from sales at the Decatur store. In addition to commissions and reimbursement in full for any funds advanced for additional inventory, defendant was also entitled to 33 2/3% of the sale profits of the Bloomington store. Prior to the sale, defendant paid Just Sofas a $30,000 "consultant's advance," to be used at the discretion of Just Sofas. These funds were not used to

purchase "additional inventory."

¶ 13 Under the terms of the agreement, defendant and Just Sofas agreed to maintain the confidentiality of all of their dealings. Just Sofas was responsible for payment of all taxes, reporting to government authorities and obtaining "lender consents" for the sale. The agreement further provided both parties were independent contractors.

¶ 14 Neither Just Sofas nor defendant obtained plaintiff's consent to the consulting agreement. Neither informed plaintiff about the terms of the agreement, defendant's involvement in the sale, or defendant's receipt and distribution of sale proceeds until after the sale ended.

¶ 15 On April 6, 2009, plaintiff renewed the $25,000 loan to Just Sofas for an additional 60 days at the request of Just Sofas. At the time of the renewal, Just Sofas did not inform plaintiff it intended to close the Bloomington store or have a sale in Decatur, nor did it inform plaintiff about defendant or the consulting agreement.

¶ 16 In April 2009, defendant obtained a UCC search and discovered plaintiff's previously filed financing statement covering the inventory of Just Sofas. On April 16, 2009, defendant sent plaintiff a letter by certified mail informing plaintiff it was providing inventory to Just Sofas and "has or will acquire a purchase money security interest in the Inventory, and any and all proceeds thereof." The letter included a copy of defendant's UCC financing statement filed with the Illinois Secretary of State on April 16, 2009.

¶ 17 In a letter dated April 21, 2009, Just Sofas authorized defendant to pay $40,000 from inventory sale proceeds to Ashley Furniture in payment of Just Sofas' "past debt" to Ashley Furniture. Ashley Furniture did not have a UCC financing statement on file with the Secretary of State.

¶ 18 The sales at the Bloomington and Decatur stores began in late April 2009, and ran through July 12, 2009. In late April or early May, James Hall, plaintiff's president, saw a flyer or an advertisement in the local paper which indicated the Bloomington store was closing. The sale advertisements did not mention or refer to the involvement of defendant. At Hall's direction, John Rohn, a loan officer, contacted Geoff Clouser, president of Just Sofas, who informed him Just Sofas was closing the Bloomington store but would continue in business at the Decatur store. He did not tell Rohn about defendant's involvement in the sales. During the time of the sales, Just Sofas paid on its loans in a manner satisfactory to plaintiff and plaintiff renewed the $100,000 and $25,000 notes.

¶ 19 Defendant required the inventory sale proceeds be deposited into an account administered by it in order to ensure "all obligations were paid pursuant to the Consulting Agreement." From the sale proceeds defendant paid its purchase money security interest and all sale costs in full. From the Decatur sale proceeds, defendant also distributed $6,745.12 to itself in commissions on the sale of existing inventory, $30,000 to itself in repayment of the consultant's advance, $40,000 to Ashley Furniture on the Just Sofas antecedent debt and $96,010.84 to Just Sofas exclusive of the consultant's advance. At the end of the Decatur sale, $8,876.44 remained in the Decatur sale account as of the final accounting on March 20, 2010.

¶ 20 From the Bloomington sale proceeds, defendant distributed $9,379.44 to itself for commission on the sale of existing inventory and $85,989.37 to Just Sofas. At the end of the Bloomington sale, $22,332.30 remained in the Bloomington sale account as of the final accounting on March 29, 2010. A total of $181,000.21 was distributed to Just Sofas as a result of both sales. Just Sofas apparently paid none of those funds to plaintiff.

¶ 21 Defendant did not distribute the $31,208.74 remaining at the end of both sales to Just Sofas but used those funds in the defense of this suit.

¶ 22 In early August 2009, Rohn received a call from Clouser's attorney. The attorney informed Rohn at the end of the sales, Clouser took the remaining furniture to Wapella Auction House and sold it. He also told Rohn about defendant's involvement in the sales. The Just Sofas attorney sent a follow-up letter to Rohn dated August 12, 2009, which indicated Just Sofas would be unable to reopen due to inadequate revenues derived from the liquidation sales and Clouser deposited "in his account at [plaintiff] $12,280.80 which represented the entire proceeds, net of sales tax, from the auction of certain inventory that remained at the conclusion of the liquidation sale."

¶ 23 Shortly after defendant's identity was disclosed, Rohn called defendant's accounting department and informed them plaintiff was the first lien holder on the Just Sofas inventory and any proceeds from the sale of that inventory needed to be made payable to plaintiff as well as Just Sofas. Plaintiff did not receive any funds from defendant.

¶ 24 On September 9, 2009, Just Sofas filed for bankruptcy, and Clouser filed for bankruptcy on September 23, 2010. On April 10, 2010, counsel for plaintiff sent a letter to defendant stating plaintiff had a perfected security interest in the Just Sofas inventory, was not a party to the consulting agreement, and was not named as a joint payee on any of the sale-proceeds checks defendant distributed to Just Sofas. The letter claimed loss as the result of defendant's conduct and offered to settle for a cash payment. As of August 20, 2013, the total outstanding debt on the Just Sofas loans owed to plaintiff was $347,765.55.

¶ 25 On October 12, 2010, plaintiff filed its original complaint against defendant under

a theory of conversion. On January 11, 2011, plaintiff filed an amended complaint. On January 21, 2011, defendant filed a motion to dismiss. On April 7, 2011, the trial court denied the motion to dismiss. On July 30, 2012, defendant filed a motion for summary judgment, which was denied on August 31, 2012.

¶ 26 After an August 2013 bench trial, the trial court entered judgment for defendant and ruled plaintiff "waived its interest in the security agreement due to its contributory negligence." The court found plaintiff was negligent in the following respects: (1) making the initial loans of $200,000 and $100,000 "without a sufficient amount of inventory to support the loan[s] in case of default"; (2) executing the loans by failing to have Clouser establish his business accounts at plaintiff so it could monitor deposits and withdrawals; (3) failing to communicate with defendant to reasonably discuss the possibility of commingling of assets once it was aware of defendant's purchase-money security interest; (4) missing warning signs of excessive personal expenses by Clouser, such as the purchase of an expensive vehicle and country club dues running through the business account of Just Sofas, and failing to take any actions other than rolling over notes after Just Sofas issued bad checks; and (5) "fail[ing] to obtain recent income and asset financial statements" from Just Sofas.

¶ 27 In addition, the trial court found plaintiff failed to prove its damages by a preponderance of the evidence, especially as to the value of inventories. The court also found allowing defendant to have administrative control over sales proceeds during inventory-reduction and liquidation sales was not a breach of the security agreement between plaintiff and Just Sofas, as ultimate control remained with Just Sofas. The court also concluded Just Sofas was not in default on any of its three loans during the period of the liquidation and inventory-reduction

sales. The court allowed defendant to apply the $31,208.74 remaining at the end of the sales to its attorney fees, which were in excess of $33,000.

¶ 28 On September 13, 2013, plaintiff filed a notice of appeal. On September 25, 2013, defendant filed a motion for Rule 137 sanctions and costs. On November 19, 2013, the trial court heard the motion and denied sanctions but amended its August 26, 2013, judgment to include an order for costs payable to defendant. The court directed the parties to either agree as to the amount of costs or submit briefs for the court's determination. The parties submitted briefs and on December 4, 2013, the court entered an amended judgment awarding defendant costs of $115. On December 6, 2013, defendant filed a notice of cross-appeal as to the judgment denying sanctions. On December 10, 2013, plaintiff filed an amended notice of appeal to add the issue of costs awarded to defendant.

¶ 29 II. ANALYSIS

¶ 30 A. Conversion

¶ 31 Plaintiff filed suit against defendant for conversion, claiming defendant wrongfully took possession of and distributed plaintiff's collateral-inventory proceeds to entities having an interest inferior to that of plaintiff. In order to sustain an action for conversion, the plaintiff must prove several elements by a preponderance of the evidence: (1) plaintiff has a right to the property; (2) plaintiff has an absolute and unconditional right to immediate possession of the property; (3) plaintiff has made a demand for possession; and (4) defendant wrongfully and without authorization assumed control, dominion or ownership over plaintiff's property. *Cirrincione v. Johnson*, 184 Ill. 2d 109, 114, 703 N.E.2d 67, 70 (1998); *Bill Marek's The Competitive Edge, Inc. v. Mickelson Group, Inc.*, 346 Ill. App. 3d 996, 1003, 806 N.E.2d

280, 285 (2004).

¶ 32 Plaintiff argues it perfected a security interest in the inventory of Just Sofas and the proceeds from the sale of the inventory by filing a UCC financing statement containing the name of the debtor, Just Sofas, the name of the secured party, plaintiff, and a description of the collateral. See 810 ILCS 5/9-309, 9-501 and 9-502 (West 2006). It is undisputed plaintiff had a perfected security interest in the inventory of Just Sofas. Plaintiff's security interest was also superior to any other creditor's interest as it was first filed. The only exception was in the case of the inventory purchased through defendant's credit. There, defendant obtained priority in that inventory only over plaintiff's existing security interest as defendant obtained a purchase-money security interest for the after-obtained inventory by giving written notice to plaintiff as an existing creditor in addition to filing a financing statement. See 810 ILCS 5/9-324 (West 2008).

¶ 33 Plaintiff argues it had a right to immediate possession of the inventory property and proceeds of its sale because Just Sofas was in default of its loan agreement with plaintiff by selling the inventory outside the normal course of business as described in the loan agreement. The trial court found Just Sofas was not in default of its loan agreement. It is undisputed Just Sofas made all of its loan payments in a manner satisfactory to plaintiff. While plaintiff contends Just Sofas could be in default of the loan agreement if a going-out-of-business sale is considered to be a sale outside the normal course of business, the trial court concluded plaintiff had no right to declare a default, because there was no default, and the inventory liquidation-reduction sale was as "successful as it could have been to all parties, but one can do only so much for a dying patient." This indicates the court found the sale was not outside the ordinary course of business.

¶ 34 Plaintiff argues it did make a demand to defendant for an accounting of the inventory proceeds once it was aware of both the going-out-of-business sale and defendant's role in it. There is evidence plaintiff was aware of the sale while it was going on and had notice of the consulting agreement between Just Sofas and defendant which gave defendant the authority to hold and distribute the proceeds of the sale. This put plaintiff on notice to inquire of defendant and Clouser as to its handling of inventory proceeds. Instead, plaintiff made no inquiries of defendant until the sale proceeds had been paid out to other, inferior creditors.

¶ 35 Plaintiff contends defendant took possession and control of the inventory-sale proceeds. The control was not simply administrative, on behalf of Just Sofas, but was in its standing as a secured creditor.

¶ 36 If the issue is application of law to facts, the reviewing court may determine the correctness of the ruling independently of the trial court's judgment and conduct a *de novo* review. *Norskog v. Pfiel*, 197 Ill. 2d 60, 70-71, 755 N.E.2d 1, 9 (2001). Where the issue is a trial court's factual findings, they will only be overturned on appeal if they are against the manifest weight of the evidence. See *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 452, 905 N.E.2d 747, 751 (2009). We conclude the court's factual findings are at issue and must be reviewed under the manifest-weight-of-the-evidence standard.

¶ 37 Although the trial court made many findings pertinent to whether plaintiff properly proved all of the elements of conversion, its most important finding and the one we find dispositive of the case was that plaintiff's conduct during the course of its loan history with Just Sofas defeats its claim.

¶ 38 Conversion is an intentional tort. *In re Thebus*, 108 Ill. 2d 255, 259, 483 N.E.2d

1258, 1260 (1985). Contributory negligence is not a defense to a suit founded on an intentional tort. *Rusher v. Smith*, 70 Ill. App. 3d 889, 893, 388 N.E.2d 906, 910 (1979). We recognize the trial court used the phrase "contributory negligence." That was inapt. We are not bound by that phrase. The trial court believed its factual findings showed contributory negligence on the part of plaintiff. We conclude those factual findings show waiver and lead to the same result. Waiver may be a defense to the intentional tort of conversion. Waiver is usually defined as the intentional relinquishment of a known right. *Ryder v. Bank of Hickory Hills*, 146 Ill. 2d 98, 104, 585 N.E.2d 46, 49 (1991). Waiver may also be implied and may be proved by clear, unequivocal, and decisive acts of the party who is alleged to have committed waiver. *Id*. at 105, 585 N.E.2d at 49. In this case, the trial court found plaintiff waived its right in Just Sofas' inventory and proceeds from its sale created by its security interest due to the numerous and decisive failures to act with any degree of prudence or acumen in creating the loans, renewing the loans, monitoring the loans, and monitoring the activities of Just Sofas and its president.

¶ 39 The trial court's determination plaintiff waived its right to the inventory of Just Sofas was not erroneous. The court's findings of fact were not against the manifest weight of the evidence. Plaintiff made loans to Just Sofas without sufficient inventory collateral. Plaintiff renewed at least one of the loans while it knew of the going-out-of-business and inventory-reduction sales. Plaintiff failed to require Just Sofas to keep its business accounts at plaintiff's bank. Plaintiff failed to communicate with defendant after receiving the purchase-money notice and obtaining knowledge of the sales in order to keep track of which inventory secured plaintiff's interests and which secured defendant's interests. Plaintiff failed to take any action other than "rolling over notes" after Just Sofas issued bad checks. Plaintiff failed to obtain recent income

and asset statements from Just Sofas. This litany of actions or failures to act qualifies as a decisive act and is more than enough to find implied waiver of plaintiff's right to the inventory of Just Sofas and the proceeds from the sale of that inventory.

¶ 40 As the trial court noted, this case is best summed up by the case of *In re Southern Vermont Supply, Inc.*, 58 B.R. 887 (1986), which involved a dispute between a purchase-money secured-interest lender such as defendant and a floating-lien creditor such as plaintiff. The court stated:

> "[the floating-lien creditor] cannot now complain the notice is insufficient when it, like an ostrich that squawks and buries its head in the sand when danger approaches, merely asserted its first security position and then took no further action to protect itself."
>
> *Id*. at 894.

¶ 41 The facts and legal theories raised in this case differ from those raised in *Vermont Supply, Inc.*, the idea is the same: a secured-floating-lien creditor cannot simply rely on its status as the first secured creditor to protect itself against inferior creditors. Once it has knowledge of actions detrimental or potentially detrimental to its position, it needs to take action to protect itself and not rely on others to protect it or wait until all detrimental actions have occurred before trying to undo them.

¶ 42 Lest we be misunderstood, the business practices of Just Sofas, its president Clouser, and Deere Park Associates, Inc., were less than praiseworthy. Transparency and communication would have made for a more equitable outcome for all concerned. Instead, the

bank, Deere Park Associates, Inc., and Clouser are each left with their reputations and business judgments besmirched.

¶ 43 We find plaintiff has waived its right to the inventory of Just Sofas and the proceeds from its sale. The trial court's judgment against plaintiff in its conversion action was not against the manifest weight of the evidence and is affirmed.

¶ 44 B. Motion for Sanctions

¶ 45 On September 25, 2013, defendant filed a motion for sanctions and costs pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013). Rule 137 allows a party to recover an appropriate sanction, reasonable attorney fees, and costs incurred if pleadings are: (i) filed after reasonable inquiry not well grounded in fact; (ii) not warranted by existing law; or (iii) for an improper purpose. Ill. S. Ct. R. 137 (eff. July 1, 2013).

¶ 46 On November 19, 2013, the trial court issued an order denying sanctions but amending its August 26, 2013, judgment to include an order for costs to defendant. The court found defendant failed to show any basis for sanctions. There was a good-faith dispute between the parties over a substantive question of law—whether negligence could be a defense to the intentional tort of conversion. There was a good-faith dispute over whether the doctrine of waiver applied. There was a total lack of communication between the parties, which resulted in a court appearance due to a commingling of inventory/assets.

¶ 47 A decision whether to impose sanctions under Rule 137 is left to the sound discretion of the trial court and will not be overturned unless it is an abuse of discretion. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 487, 693 N.E.2d 358, 372 (1998).

¶ 48 The party requesting sanctions is obligated to show the opposing party made

assertions of fact which were untrue and were made without reasonable cause. *Reyes v. Compass Health Care Plans*, 252 Ill. App. 3d 1072, 1079, 625 N.E.2d 246, 251 (1993).

¶ 49 Defendant argues the trial court abused its discretion in denying defendant sanctions against plaintiff because plaintiff misrepresented facts in its pleadings and affidavits. In addition, plaintiff pursued a claim not based on existing case law.

¶ 50 For example, defendant contends certain allegations made by plaintiff are false. Paragraph 11 of plaintiff's amended complaint states: "Between April 24, 20[0]9[,] and September 1, 2009, defendant *** liquidated substantially all of the inventory of [Just Sofas] outside the normal course of the business of Just Sofas." Defendant argues plaintiff knew defendant was just a consultant and was not the party who liquidated Just Sofas' merchandise. Further, defendant's involvement ended on July 12, 2009. Paragraph 19 states: "The inventory[-]liquidation sale conducted and controlled by defendant *** was outside the ordinary course of business of Just Sofas." Defendant argues plaintiff knew defendant did not "conduct and control" the sale.

¶ 51 In fact, defendant acted as a secured creditor in the Just Sofas sales; selected a "store manager" and an "accounting manager" for each of the store locations, with the "store manager" for the Bloomington store to act as "sale manager" for both stores; and took sole possession of the sale proceeds and still retained sale proceeds after July 12, 2009, and plaintiff had not consented to defendant's involvement in the sales. Further, by the time plaintiff filed its complaint, it was aware of the consulting agreement and the fact it provided ample justification for the conclusion defendant conducted and controlled the sales.

¶ 52 Defendant further contends plaintiff knew of the liquidation sales and defendant's

involvement in them while they were going on but denied this knowledge. The record indicates defendant never notified plaintiff of the sales or its involvement with them. Instead, a member of plaintiff's staff noticed an advertisement for the sales and then had an employee call Clouser to see what was going on. Clouser told plaintiff of the sales and defendant's involvement but stated the only store to be closed was the one in Bloomington. He intended to keep open the Decatur store.

¶ 53 We find no abuse of discretion in the trial court's finding no sanctions were proved to be warranted.

¶ 54 The trial court's order denying sanctions provided defendant should be awarded costs because the court believed any defendant who prevails in court is entitled to costs. The court left the amount to be agreed upon by the parties. Costs eventually had to be determined by the court and were assessed in the amount of $115. Plaintiff's amended notice of appeal stated it was appealing the award of costs but not the amount. On appeal, no arguments were made by either party on this issue. Therefore, the court's award of costs is affirmed.

¶ 55 C. Attorney Fees

¶ 56 We note defendant retained $31,208.74 from the proceeds of both sales after all distributions were made. It did so under the misguided theory it was entitled to use those funds to defend the lawsuit. The trial court mistakenly found the parties stipulated the funds could be retained by defendant for that purpose. The record shows only that the parties stipulated defendant incurred *more* than $33,000 in attorney fees.

¶ 57 Plaintiff did not raise this issue in a posttrial motion, nor is it mentioned in the issues presented for review. It is included in the argument section of the brief discussing an

incorrect measure of damages. While we could find the issue forfeited, we choose to correct the inadvertent error of the trial court. Absent such a stipulation, there is no basis in the record or in this litigation for defendant to retain those funds.

¶ 58 In the interests of judicial economy, we direct defendant to remit those funds to plaintiff without the need for further hearing in the trial court.

¶ 59 III. CONCLUSION

¶ 60 We affirm the trial court's judgment.

¶ 61 Affirmed.